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THE INTERNATIONAL CRIMINAL COURT: SEEKING GLOBAL JUSTICE^{*}

Luis Moreno-Ocampo[†]

INTRODUCTION

The Rome Statute is an innovative legal design, a twenty-first century institution modeled to address the threats and challenges of the twenty-first century. The Prosecutor of the International Criminal Court (ICC) must apply this new law and make daily decisions on new operational standards. To that purpose, he must maintain a continuous dialogue with academic communities.

This essay tackles the wide prospects opened by the Rome Treaty, and addresses the nature of the interactions among the Court, states, and international organizations.

I. THE ROME STATUTE'S INNOVATIONS CONCERNING THE INTERNATIONAL CRIMINAL JUSTICE SYSTEM

The goal of the Rome Statute is to end the impunity for the most serious crimes of international concern—genocide, crimes against humanity,

^{*} This commentary was originally presented as the Frederick K. Cox International Law Center Lecture in Global Legal Reform on October 16, 2007 at the Case Western Reserve University School of Law. A webcast of the lecture may be accessed at <http://law.case.edu/centers/cox/webcast.asp?dt=20071016&type=wmv>.

[†] Prosecutor, International Criminal Court; Recipient of the Cox International Humanitarian Award for Advancing Global Justice. Luis Moreno-Ocampo was elected as the first Prosecutor of the International Criminal Court on April 21, 2003. In 1985 Dr. Moreno-Ocampo was the deputy prosecutor in the “military juntas trial” in his home country, Argentina, the first case against top commanders responsible for mass atrocities since the Nuremberg trials. During the following twenty years Dr. Moreno-Ocampo worked on several high profile cases of national and international criminal justice as a prosecutor and as an attorney. He also served as a visiting professor at both Stanford and Harvard Universities and was a board member of national and international NGOs, including The Project on Justice in Times of Transition, Poder Ciudadano and Transparency International. As an attorney since 1992, he worked on issues ranging from human rights, civic rights, corruption control, corporate responsibility, the protection of journalists and representing victims of gross violations of human rights.

His mandate today is to investigate and prosecute the most serious crimes of concern to the international community, namely genocide, crimes against humanity, and war crimes. He has currently opened investigations into the Democratic Republic of Congo, Uganda, Darfur (the Sudan) and the Central African Republic. An independent and determined Prosecutor, Dr. Moreno-Ocampo has in the course of his career indicted presidents, ministers, top military commanders and militia leaders, alike.

and war crimes—and to contribute to the prevention of such crimes.¹ To achieve its goal, the Rome Statute created a novel system of interaction among States, international organizations, and a permanent international criminal court supported by an emerging global civil society.² States not only committed to applying this law within their own borders, but they also agreed to participate in a novel system of international cooperation. They committed themselves to supporting a permanent ICC, whenever and wherever the Court decides to intervene. The Rome Statute is more than a Court; it created a global criminal justice system.

The ICC model took over a century to develop. In 1873, Louis Gabriel Gustave Moynier, the Swiss lawyer who co-founded the International Committee of the Red Cross (ICRC), proposed the creation of a permanent and impartial international criminal court. He noted that

[a] treaty was not a law imposed by a superior authority on its subordinates . . . [but] only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them. The only reasonable guarantee should lie in the creation of international jurisdiction with the necessary power to compel obedience.³

Despite his efforts, the world witnessed the horror of three genocides—in the Holocaust, the Former Yugoslavia, and Rwanda—before the international community decided to create *ad hoc* international tribunals to address those crimes.

Finally, in 1998, countries from all the continents actively participated in the elaboration of a new and comprehensive body of law: the Rome Statute. Substantive law was codified in one detailed text, and different legal and procedural traditions integrated into a new international model. The duties of the states, the complementarity system, and the conditions to trigger the jurisdiction of the Court were well-defined.⁴ In 1998, a global criminal justice system was at last established.

¹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf.

² Rome Statute, *supra* note 1, art. 1.

³ LOUIS GABRIEL GUSTAVE MOYNIER, ÉTUDE SUR LA CONVENTION DE GENEVE POUR L'AMELIORATION DU SORT DES MILITAIRES BLESSES DANS LES ARMEES EN CAMPAGNE 300 (1870). (English translation in PIERRE BOISSIER, FROM SOLFERINO TO TSUSHIMA: HISTORY OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS, 282 (1963)).

⁴ See Rome Statute, *supra* note 1, arts. 5–21.

II. THE INTERACTION BETWEEN THE COURT, STATES, AND INTERNATIONAL ORGANIZATIONS

After five years of operations, the time has come to take a look at this new system from a wider point of view. The Office of the Prosecutor (OTP) opened investigations in four situations and collected evidence against those most responsible for massive crimes. The Judges issued ten arrest warrants, held one confirmation of charges hearing, and the Court's first trial is about to begin. The ICC has made the law a working system and is driving other actors, such as states, international organizations, and global civil society, to new and demanding challenges.

Since the Court entered into operation, the number of states parties has continued to grow. It has grown from the required sixty to enter into force to 106 state parties, Madagascar being the most recent addition.⁵ This number of ratifications helped to harmonize the work of the ICC with the United Nations and other international organizations, such as the African Union, the European Union, the Organization of American States, and the Arab League. U.N. Security Council Resolution 1593, referring the Darfur case to the Prosecutor, confirmed this recognition, which is even more remarkable because the recognition included the decision of non-state parties.⁶

Additionally, more than forty states have now passed some form of legislation implementing the ICC rules and bringing their domestic laws into conformity with their international obligations.⁷ Implementing legislation strengthens the interaction between States and the ICC, and contributes to ending the culture of impunity by condemning these crimes with a louder, more unified voice. In Colombia, the Rome Statute's provisions influenced legislation and proceedings against paramilitary forces. One of the most interesting achievements of the Rome Statute is that armies around the world are adjusting their regulations to avoid the possibility of committing acts falling under ICC jurisdiction. National prosecutions for genocide, crimes against humanity, war crimes, and other crimes connected with these atrocities now occur all over the world.

Political leaders and negotiators in the context of international conflicts are learning—not without reluctance—to manage international conflicts and to demobilize violent groups, thereby respecting the new framework established by the Rome Statute. There are continuous discussions on

⁵ Press Release, United Nations, Madagascar Ratifies Statute Establishing International Criminal Court (Mar. 17, 2008), <http://www.un.org/apps/news/story.asp?NewsID=26002&Cr=genocide&Cr1=>.

⁶ S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

⁷ See HUMAN RIGHTS WATCH, THE STATUS OF ICC IMPLEMENTING LEGISLATION, <http://www.hrw.org/campaigns/icc/docs/icc-implementation.pdf>.

how to execute the arrest warrants of individuals protected by their own governments or by their own armies. An emerging global civil society, especially nongovernmental organizations (NGOs) from different regions of the world under the auspices of the Coalition for the ICC, have been deeply involved in these activities. The Court's operations are starting to create a new global dynamic.

III. THE IMPORTANT ROLE OF INTERNATIONAL ACADEMIA WITHIN THE NEW GLOBAL CRIMINAL JUSTICE SYSTEM

The involvement of academic communities will be invaluable in the analysis of this new system, particularly in introducing new theoretical frameworks to explain a jurisdiction that reaches beyond any national or regional boundary, and in defining how the Rome Statute integrates sovereign states and an international criminal court into one legal system. This is a huge challenge for criminal law scholars, who normally focus on substantive law and court procedure. A defendant's initial appearance before the Court is generally the first moment of their analysis. For the Prosecutor of the ICC, when the prisoner arrives in the courtroom, an enormous accomplishment has already been achieved. It means that the OTP took the necessary steps to analyze crime patterns and to select a situation that requires our investigation. It means that the OTP: received referrals, or an authorization by the Pre-Trial Chamber to open an investigation *proprio motu*; conducted investigation of massive crimes during ongoing conflicts; interacted with victims and local communities; protected witnesses and investigators; secured the cooperation needed to carry out investigations, from visas for the witnesses to the evacuation of threatened staff in deteriorating security situations; collected the evidence necessary to prosecute those who bear the greatest responsibility of the most serious crimes; and finally, ensured the appearance of the persons sought by the Court. This interaction between the OTP and external actors makes a trial possible, but is not widely known or understood.

Scholars must also explain that the law established by the Rome Statute is not just relevant for alleged criminals, judges, prosecutors, and the defense. The Rome Statute also applies to political leaders working to seek solutions to international conflicts, military actors, diplomats, negotiators, and educators. Research could help them to implement the new legal framework consolidated by the Rome Statute. Thus, there is a need to educate global citizens and global professionals about the potential of the ICC.

IV. THE *PROPRIO MOTU* POWERS OF THE PROSECUTOR AND THE INNOVATIVE LEGAL FRAMEWORK OF THE ROME SYSTEM

Among the characteristics that make the ICC such a novel project is the *proprio motu* power of the Prosecutor to select situations to investigate,

as established by Article 15 of the Statute.⁸ It defines the judicial mandate of the Court and asserts that the legal framework defined by the Rome Statute must be respected in the resolution of any conflict. Few commentators on the Statute have measured the impact of this provision. Nevertheless, it is the most distinctive feature of the ICC, especially when compared to the previous *ad hoc* international criminal tribunals.

From Nuremberg to the *ad hoc* tribunals for Yugoslavia and Rwanda, political authorities selected situations, while international prosecutors could only select cases within the situations. They had no authority to decide not to investigate the situation, and they could not decide to investigate beyond the jurisdiction granted by a political body.

The *proprio motu* power was the object of strong debate in Rome. While some delegations emphasized that the Prosecutor should be empowered to initiate investigations *ex officio*, others feared that such an independent power could lead to “frivolous and politicized” prosecutions and would, therefore, undermine its credibility. The United States, for example, opposed such an independent prosecutor arguing that they could not accept the proposition that an independent prosecutor—unconstrained by any other entity—would at all times act in a political void with no political or personal agenda when initiating a case before the Court.⁹ Eventually, an Argentine-German proposal was generally supported, and it obliged the Prosecutor to submit to the Pre-Trial Chamber a request for authorization of an investigation before proceeding with a *proprio motu* investigation.

By establishing in Rome the *proprio motu* powers of the Prosecutor to open an investigation, subject only to judicial review and without an additional trigger from States or the U.N. Security Council, the treaty ensured that the requirements of justice could prevail over any political decision. This is the first and most important strength of Article 15. States or the U.N. Security Council can choose to refer situations to the Court, but if they do not, the Court retains the authority to select situations independently through the provisions of Article 15 of the Statute. The selection of situations is, therefore, a judicial decision.

Why is Article 15 such a defining provision? For centuries conflicts were resolved through negotiations without legal constraints or wars. When the world was confronted with massive atrocities, there were essentially only two options available: either negotiate the impunity with the worst perpetrators or go to war. Idi Amin Dada and Baby Doc Duvalier were pushed away into “golden exile,” leaving their countries’ problems unre-

⁸ See Rome Statute, *supra* note 1, art. 15.

⁹ Press Release, Human Rights Watch, Human Rights Watch Condemns United States’ Threat to Sabotage International Criminal Court (July 9, 1998), <http://hrw.org/english/docs/1998/07/09/usint1219.htm>.

solved. In Uganda and Haiti, impunity produced recurring violence. But in Rome in 1998, a new and entirely different approach was adopted. The Statute ensures that the law will guarantee lasting peace, and that impunity for the worst perpetrators is no longer an option. The treaty creates a judicial actor on the international scene, and the mere existence of this independent judicial actor will provide incentives to the states parties to apply the law. If they do not apply the law, the Court will. It is a new concept in the international arena: the law must be respected.

The drafters of the Rome Statute were not naïve idealists; they were working to create a new institution to address the problems of the real world. They built the law upon the lessons learned from the violence and atrocities of the twentieth century, when massive crimes crossed national borders and the international community failed to protect Armenians, Jews, Russians, Tutsis, and Arabs, among other members of different communities in Europe, Africa, Asia, and the Americas. The Rome drafters were realists; they built the law on the recognition that in the twenty-first century the conflicts are different than in the past, and legitimacy is a key factor in solving them. Today, reports connect militias in Ituri (in the Democratic Republic of the Congo (DRC)) with arms dealers from the Ukraine, and diamond dealers in Belgium, and they are all using international banks. This type of global criminality faces national law enforcement agencies. No state has sufficient power or legitimacy to guarantee the life and freedom of its citizens if the international community does not uphold the rule of law.

Based on Article 15, the OTP has the duty to proactively collect information about alleged crimes falling under the Court's jurisdiction and to select situations to investigate independently.¹⁰ An entire division was created to face this responsibility. The Jurisdiction, Complementary and Cooperation Division (JCCD) assesses all communications received on alleged crimes falling under the Court's jurisdiction, and routinely reviews all open source documents describing such crimes. In the last few years, the OTP analyzed a number of situations. Of those, four situations were selected for investigation and two, Venezuela and alleged crimes committed by nationals of state parties in Iraq, were dismissed. In 2003, the OTP selected the situations in the DRC and Northern Uganda as the gravest situations admissible under the jurisdiction of the Court. The Darfur and Central African Republic (CAR) situations also met the gravity standard.

The OTP reviewed the admissibility of these situations, and triggered the jurisdiction of the Court in accordance with the peculiarities of each case. In the case of the DRC for instance, in a report to the Assembly of States Parties in September 2003, the Prosecutor announced publicly that he was prepared to use his *proprio motu* powers to initiate an investigation

¹⁰ Rome Statute, *supra* note 1, art. 15.

in the DRC, but he publicly invited its Government to proceed with a referral. Again, it should be emphasized that the very existence of Article 15 means that the question is never whether the OTP will open an investigation, but how it will be triggered.

V. THE CHALLENGE OF ENFORCING JUDICIAL DECISIONS

As the Court is fully operational, states are now confronted with a new challenge: they must enforce judicial decisions. Currently, six of ten arrest warrants are pending.¹¹ States must enforce judicial decisions that do not necessarily fit with their political wishes. As the Court becomes operational, a judicial actor is actively putting limits on the political actors. This is normal in national systems, and must be normal in the international arena. That is the meaning and the strength of Article 15.

As the Prosecutor of the ICC, I have a judicial mandate. My role is to prosecute those who bear the greatest responsibility for the most serious crimes. The aim of my Office is to contribute to the prevention of such crimes by strengthening the rule of law, highlighting the suffering of the victims and marginalizing the most violent leaders. This could be an important contribution to States' work, but it requires adjusting the negotiation to the law. They can not offer impunity to those who are willing to negotiate. In the framework of the Rome Statute, violence can be neither ignored nor rewarded. As negotiators have told me, we took away tools from their tool kit such as amnesty, immunity. But such tools just did not work. And we offered new ones. They can and they must use them

The Darfur case demonstrates the need to update and harmonize old conflict management strategies with a twenty-first century solution, respecting the facts and the law, and building the legitimacy of an independent Court to achieve legitimate solutions. The evidence gathered by the OTP shows that Ahmed Harun, as the Minister of State for the Interior of the Sudan, implemented the plan to use Militia/Janjaweed to attack the civilians in Darfur.¹² Under his coordination, they slaughtered thousands of people, and more than 2.5 million Darfuris have been forced out of their homes and live in camps.¹³ They have been forced to flee their land, homes, and cattle, as their villages were burnt down.

¹¹ On July 11, 2007, the Pre-Trial Chamber decided to terminate the proceedings against LRA commander Raska Lukwiya due to his death. *Prosecutor v. Kony et. al*, Case No. ICC-02/04-01-05, Decision to Terminate the Proceeding Against Raska Lukwiya (July 11, 2007).

¹² *Prosecutor v. Harun & Kushayb*, Case No. ICC-02/05-01/07, Warrant for the Arrest of Ahmad Harun, 4 (Apr. 27, 2007).

¹³ Press Release, Int'l Criminal Court, Prosecutor Opening Remarks (Fed. 27, 2007), <http://www.icc-cpi.int/press/pressreleases/228.html>.

The Judges of the ICC issued an arrest warrant against Ahmad Harun and Ali Kushayb, one of the Militia/Janjaweed leaders under his coordination, for fifty-one counts of crimes against humanity and war crimes on April 27, 2007.¹⁴ An Interpol red notice has been disseminated worldwide, and when the indicted individuals travel outside of the Sudan, they will be arrested.¹⁵

The Government of the Sudan is legally obligated to arrest Harun and Kushayb and surrender them to the Court. Nevertheless, it refuses to arrest them and denies Ahmad Harun's crimes. In June 2007, when I briefed the U.N. Security Council, I urged the international community to call upon the Government of Sudan to arrest Ahmad Harun and Ali Kushayb. At that time, right after the arrest warrants were issued, some pressure was placed on the Government, and discussions were held in Khartoum on the possibility of surrendering Harun.

But the issue of the arrest warrants has been removed from the agenda of the international community. Justice was not formally on the agenda of the U.N. Security Council's trip to Khartoum. The terms of reference called on the Sudanese government to cooperate on humanitarian aid, security, and economic reforms, but not justice. Justice was not mentioned in the U.N. Secretary-General's subsequent reports on Darfur, which instead developed a three-prong approach where humanitarian, political, and security components, but not justice, were considered.

Meanwhile, there are reports that the humanitarian situation in the camps is worsening.¹⁶ While Khartoum is booming thanks to oil proceeds and foreign investments, the camps are kept in squalid conditions. The camps suffer systematic bureaucratic impediments to the delivery of international aid, and those who dare mention it publicly are expelled. Malnutrition rates in the camps are higher than ever, there are attacks against international aid workers and peacekeepers, and there are raids on the camps and threats to those identified as local leaders. The Sudanese Minister of Humanitarian Affairs is supposed to protect the camps and facilitate the delivery of aid, but he does not. In fact, he will not because, since 2005, the Minister of State for Humanitarian Affairs has been Ahmed Harun. This is the same man who has—as Minister of State for the Interior—attacked civilians, forcing them out of their homes and into the camps that he controls. Harun is

¹⁴ Prosecutor v. Harun & Kushayb, Case No. ICC-02/05-01-07, Warrant for the Arrest of Ahmad Harun, (Apr. 27, 2007); Prosecutor v. Harun & Kushayb, Case No. ICC-02/05-01-07, Warrant for the Arrest of Ali Kushayb, (Apr. 27, 2007).

¹⁵ INTERPOL Red Notice, Wanted by the ICC, <http://www.interpol.int/Public/Wanted/Search/SearchWantedBy.asp?WANTEDBY=ICC>.

¹⁶ Press Release, United Nations, Worsening Humanitarian Situation in Sudan (Jan. 29, 2006), <http://www.un.org/News/Press/docs/2006/sc8765.doc.htm>.

deciding how much food reaches the camps; who can go there and who cannot.

Is this a mistake, or is this the second phase of his criminal activities, happening right now in front of our eyes? In Darfur, as in other situations, a comprehensive solution is needed, but world leaders must understand that if the justice component of the comprehensive solution is ignored, crimes will continue. In Darfur today, there can be no political solution, no security solution, and no humanitarian solution as long as Harun remains free in Sudan.

Harun exemplifies the need to end impunity in order to create lasting peace. In the 1990s, he was active in Southern Sudan, mobilizing local tribes and integrated them into the Popular Defense Force. He was allegedly called “The Butcher of the Nuba;” yet, his crimes were forgotten after a peace agreement was reached. He started committing atrocities again in 2002–03 and continues to commit crimes now. It is time to stop him. Arresting him will break the system and change the behaviors. It is time to end impunity in Darfur.

The Darfur case connected the U.N. Security Council and the ICC for the first time. A new model to control violence is being tested. It is a test of our commitment to use the law to prevent atrocities. The U.N. Secretary General Ban Ki-Moon recently said that “justice is a condition of peace” and “peace and justice are indivisible.”¹⁷ He continues to work with the Sudanese government to promote cooperation with the ICC.

The request to arrest Harun will not go away. On December 5, 2007, I officially informed the U.N. Security Council that the Sudan is not cooperating with the Court.¹⁸ I also reported on present crimes, finding that ongoing acts of violence are not chaotic occurrences but represent a pattern of attacks against 2.5 million displaced persons. In Darfur, during the first phase of Ahmad Harun’s plan, he forced the people out of their villages and into camps. In the second phase—happening right now—he controls them inside the camps, including their access to food, humanitarian aid, and security. There are consistent reports that new settlers are occupying the land and villages the displaced have left behind.¹⁹ Moreover, there is a new strategy to attack the displaced who try to organize themselves in the camps, such as Kalma. In these situations some are arrested and others are forcibly

¹⁷ “Peace and Justice are Indivisible” According to Ban Ki-Moon, INT’L FED. OF HUMAN RIGHTS (FIDH), Oct. 15, 2007, <http://www.fidh.org/spip.php?article4787>.

¹⁸ *Sixth Report of the Prosecutor of the ICC, to the Security Council pursuant to UNSC 1593* (2005), Dec. 5, 2007 (quoting UN Secretary-General Ban Ki-Moon, “justice is a condition of peace” and “peace and justice are indivisible.”).

¹⁹ Press Release, Int’l Criminal Court, ICC Prosecutor Report to the United Nations Security Council (Dec. 5, 2007), <http://www.icc-cpi.int/press/pressreleases/307.html>.

expelled from the camps with no means of survival and are forced to relocate in hostile areas.

Ahmed Harun is a key actor in what is happening today in Darfur. But he is not alone. The failure to take any step toward investigation, arrest, or removal from office clearly indicates the support Harun receives from other high officials. Moreover, failure to protect persons displaced by constant attacks of Militia/Janjaweed and Sudanese agents, or to facilitate the deployment of peacekeepers who could protect the victims clearly indicates endorsement, acquiescence, or active participation by other high officials.

As I indicated in my report to the Security Council on December 5, 2007, my Office will investigate those who bear the greatest responsibility for ongoing attacks against civilians; those who maintain Harun in a position to commit crimes and who instruct him. Therefore, my office opened two new investigations in 2008.

The international community must maintain a consistent approach and include the enforcement of the arrest warrant in any solution in Darfur. Moreover, the academic community should help analyze the problems and design new solutions.

CONCLUSION

The execution of the Court's decisions is the biggest challenge for the international community today. State parties of the Rome Statute must fulfill their commitment. In the words of the preamble, they must "guarantee lasting respect for and the enforcement of international justice."²⁰ Many actors must adjust. It will take time, and the academic community must help.

The law will prevail. Remember how difficult it was for national systems to develop automatic compliance with judicial decisions? We can learn from what happened in the United States almost two centuries ago. When the U.S. Supreme Court ruled against Georgia in a conflict about Cherokee lands,²¹ Georgia ignored the judicial decision. When asked about the case, President Andrew Jackson reportedly said, "John Marshall [the Supreme Court] has made his decision, now let him enforce it."²² Things have changed since then. We are witnessing the beginning of a new legal era. We are building a global criminal justice system to prevent atrocities and end impunity for the most serious crimes. The Prosecutor's duty is to apply the law without bowing to political considerations, and I will not adjust my practices to political considerations. It is time for political actors to adjust to the law.

²⁰ Rome Statute, *supra* note 1, pmbl.

²¹ Cherokee Nation v. Georgia, 30 U.S. 1, 1 (1831).

²² H.W. BRANDS, ANDREW JACKSON: HIS LIFE AND TIMES 493 (2005).

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We have no police and no army, but we have legitimacy. We will prevail.